

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 4, 2000 Session

KELLY R. LEOPOLD v. WILLIAM F. LEOPOLD

Appeal from the Chancery Court for Giles County
No. 9746 Stella L. Hargrove, Judge

No. M1999-00602-COA-R3-CV - Filed May 6, 2003

This appeal involves the dissolution of a four-year marriage. Following a bench trial, the Chancery Court for Giles County granted the wife a divorce and custody of the children. On this appeal, the husband takes issue with the trial court's decision to grant the wife the divorce and custody of the children, as well as the amount of the child support award, the division of the marital property and allocation of debts, and the award for the wife's attorney's fees. The wife also asserts that the husband's appeal is frivolous. We have determined that the parties should be declared divorced in accordance with Tenn. Code Ann. § 36-4-129(b) (2001) and that the remainder of the judgment should be affirmed. We have also determined that this appeal is not frivolous.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed as
Modified and Remanded**

BEN H. CANTRELL, P.J., M.S., WILLIAM C. KOCH, JR., J. and WILLIAM B. CAIN, J.

Andrea Huddleston, Lawrenceburg, Tennessee, for the appellant, William F. Leopold.

Robert D. Massey, Pulaski, Tennessee, for the appellee, Kelly R. Leopold.

OPINION

I.

The trial court awarded Kelly R. Leopold a divorce upon finding that William Leopold essentially treated her as an indentured servant during their brief marriage. Custody of two children was awarded to Ms. Leopold, together with child support of \$552.00 monthly based upon Mr. Leopold's presumptive income of \$25,761.00 per annum. Mr. Leopold was onerated with all business debts and most of the family debts and was ordered to pay Ms. Leopold's attorney fees.

Mr. Leopold appeals, insisting that the decree is unfair and not supported by a preponderance of all the evidence. Appellate review is *de novo* on the record, with a presumption that the judgment

is correct unless the evidence preponderates against it. Tenn. R. App. P. 13(d); *Farrar v. Farrar*, 553 S.W.741 (Tenn. 1977).

Although a number of witnesses testified, the trial court apparently found all relevant facts from the testimony of the parties. We quote:

Wife described Husband as abusive and controlling. She testified that she did not feel loved and was given no affection or attention. Wife testified that she was given no salary and no allowance from Bill's Automotive, and that Husband had to approve any money that she withdrew from the business, including lunch money. She testified that Husband never gave her enough money to run the household; that Husband never thanked her for anything; that Husband threw things at her and that sex occurred only when Husband wanted it. Wife testified that Husband slept on the couch in the living room, and that he never slept with her except for sex, only to go to the couch afterwards. Wife complained that Husband limited her long distance calls to her family, and that he controlled the money she made at Avex. She testified that Husband made her fix and bring his plate and drink to him, cut his meat, lay out his clothes in the morning and after work, pick up his clothes that he left in the floor and get up and make coffee for him at 3 to 4 a.m. if he so desired. Wife testified that Husband would leave the business at noon or 1 p.m. and not return; and that she worked hard to make the business profitable. Wife admits to an affair with an employee of the business during the marriage. She testified that she was looking for love and attention. She also admits to a relationship after separation.

Husband testified that Wife had access to all the money, and that she fixed his plate and drink out of love. He stated that Wife refused his affection and that he felt rejected by her. Husband testified that Wife was a poor housekeeper and that the house was in disarray. He said that Wife was not a good, stable mother and that she gave beer to one of the children. He testified that while he drank with her up to early 1997, Wife drank too much and that she was depressed. Husband related that he felt degraded and humiliated by her affair. He stated that he "tried everything he could, to make this woman happy."

The Court does not find Husband to be a credible witness.

The divorce is granted to Wife on grounds of inappropriate marital conduct.

We defer, as we ordinarily must, to the judgment of the trial judge with respect to the credibility of any person who testifies in open court. Mr. Leopold was found to be not credible, and the record prima facie reveals no recognized basis for a contrary conclusion on appeal. But it is only fair to observe that much of his lack of gentility - if any - occurred after Ms. Leopold confessed her adulterous behavior which occurred shortly after she began working with - not for - her husband in his automobile business. She engaged in sex with one of their employees (whose teen-age wife was their baby sitter) in the yard of his residence, explaining that she did so to “get out of an abusive situation. And I never got any love or attention at home. And there just happened to be that guy at the right time and the right place giving me that little bit of special attention.” After Ms. Leopold admitted to this conduct, she moved to Alabama with the children, found employment which she deems satisfactory, and entered into another adulterous relationship.

The trial judge decided that Ms. Leopold was less at fault than Mr. Leopold and granted her the divorce. We cannot agree with this finding. While Mr. Leopold’s lack of credibility, as found by the trial judge, casts doubts on his protestations, it in no way may serve to justify Ms. Leopold’s behavior or to entitle her to judicial absolution. We find, in accordance with Tenn. Code Ann. § 36-4-129(b), that both parties are entitled to a divorce. Therefore, the judgment will be modified to declare the parties divorced.

II. The Custody Issue

The parties’ children were ages five (5) and two (2) when the case was tried and were enrolled in a Care and Learning Center in Alabama. The director of the Center testified that they were clean, well-behaved and appeared to be well-rounded and happy. She also testified that Ms. Leopold appeared to be “keenly interested” in their welfare.

Mr. Leopold argues that the trial court erred in granting Ms. Leopold custody of the children. The analytical framework for making original custody decisions requires the courts to determine which parent is comparatively more fit to be the child’s custodian. *In re Parsons*, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995); *Bah v. Bah*, 668 S.W.2d 663, 666 (Tenn. Ct. App. 1983). Such decisions are factually driven and require courts to carefully weigh numerous considerations. *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990); *Rogero v. Pitt*, 759 S.W.2d 109, 112 (Tenn. 1988). Among these considerations are:

the age, habits, mental and emotional make-up of the child and those parties competing for custody; the education and experience of those seeking to raise the child; their character and propensities as evidenced by their past conduct; the financial and physical circumstances available in the home of each party seeking custody and the special requirements of the child; the availability and extent of third-party support; the associations and influences to which the child is most likely to be exposed in the alternatives afforded, both

positive and negative; and where is the greater likelihood of an environment for the child of love, warmth, stability, support, consistency, care and concern, and physical and spiritual nurture.

Bah v. Bah, *supra*; Tenn. Code Ann. § 36-6-106 (2001). Continuity of placement and stability are also important considerations in custody decisions. *Taylor v. Taylor*, 849 S.W.2d 319, 328 (Tenn. 1993); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997); *Contreras v. Ward*, 831 S.W.2d 288, 290 (Tenn. Ct. App. 1991); *McDaniel v. McDaniel*, 743 S.W.2d 167, 169 (Tenn. Ct. App. 1987). But continuity does not trump all other considerations. Depending on the circumstances, the parent who has been acting as the primary caregiver is not necessarily more fit than the other parent to have permanent custody. *Gaskill v. Gaskill*, 936 S.W.2d 626, 630-31 (Tenn. Ct. App. 1996).

There are no hard and fast rules for determining which custody and visitation arrangement will best serve a child's needs, *Taylor v. Taylor*, 849 S.W.2d 319, 327 (Tenn. 1993); *Dantzler v. Dantzler*, 665 S.W.2d 385, 387 (Tenn. Ct. App. 1983), and custody and visitation decisions are invariably dictated by the unique facts of each case, because each parent has his or her own vices and virtues. *Gaskill v. Gaskill*, 936 S.W.2d at 630. Custody decisions are not based on which parent is "perfect," *Bah v. Bah*, *supra*; *Edwards v. Edwards*, 501 S.W.2d 283, 290-91 (Tenn. Ct. App. 1973), or on which parent has been shown to be completely unfit. *Griffin v. Stone*, 834 S.W.2d 300, 305 (Tenn. Ct. App. 1992); *Harris v. Harris*, 832 S.W.2d 352, 353 (Tenn. Ct. App. 1992). Rather, custody decisions require the courts to determine which of the available custodial alternatives appears to be best calculated to meet the child's needs.

Custody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings. Trial courts must be able to exercise broad discretion in these matters, as long as their decisions are based on the evidence and on an appropriate application of the applicable principles of law. *D v. K*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). Accordingly, appellate courts are reluctant to second-guess a trial court's decision. *Gaskill v. Gaskill*, 936 S.W.2d at 631; *Nichols v. Nichols*, 792 S.W.2d at 716; *Doles v. Doles*, 848 S.W.2d 656, 661 (Tenn. Ct. App. 1992).

The central question in reviewing the trial court's custody decision in this case is whether the evidence preponderates against its conclusion that Ms. Leopold is a comparatively more fit parent than Mr. Leopold. Both parents have an extended family available to help care for the children, and family members attested to their respective parenting skills. Ms. Leopold is not a "perfect" parent, and Mr. Leopold is not an "unfit" parent. However, continuity weighs in Ms. Leopold's favor. She has been the children's primary caregiver before and after the divorce. The children are happy and healthy in her care. The director of the children's current day-care center in Alabama testified that the children arrive at the center on time, interact well with others, and sleep soundly, and that Ms. Leopold is interested in the children's welfare. The preponderance of the evidence does not weigh against the determination that continuing to live with their mother serves the children's best interests.

III. Child Support

Mr. Leopold's next issue is whether the trial court erred in its calculation of child support. In determining child support courts must apply, as a rebuttable presumption, the Child Support Guidelines currently in force. Tenn. Code Ann. § 36-5-101(e)(1) (Supp. 2002); *Brooks v. Brooks*, 992 S.W.2d 403, 407 (Tenn. 1999); *Nash v. Mulle*, 846 S.W.2d 803, 804 (Tenn. 1993). The Child Support Guidelines provide a presumptive minimum base for calculating child support, Tenn. Comp. R. & Regs. r. 1240-2-4-.02(5), (7) (1994) payable by noncustodial parents with whom the children stay overnight at least every other weekend from Friday to Sunday, two weeks in the summer, and two weeks during holidays every year. Tenn. Comp. R. & Regs. r. 1240-2-4-.02(6).

The Child Support Guidelines provide a straightforward mathematical formula for calculating child support. The presumptive amount of support for the obligor parent is a "flat percentage of the obligor's net income . . . depending on the number of children for whom support is being set in the instant case." Tenn. Comp. R. & Regs. r. 1240-2-4-.03(2) (1994). The percentages are as follows: twenty-one percent of the obligor's net income for one child, thirty-two percent for two children, forty-one percent for three children, forty-six percent for four children, and fifty percent for five or more children. *Adams v. Reed*, 874 S.W.2d 61, 63 (Tenn. Ct. App. 1993); Tenn. Comp. R. & Regs. r. 1240-2-4-.03(5) (1997).

This begs the question of how courts calculate an obligor parent's "net income." Net income is "gross income" reduced by deductions for withholding tax, FICA, and any other court-ordered child support the obligor is paying. *Young v. Young*, 971 S.W.2d 386, 392 (Tenn. Ct. App. 1997); Tenn. Comp. R. & Regs. r. 1240-2-4-.03(4) (1997). "Gross income" ordinarily includes all the obligor parent's income from any source, whether earned or unearned. *Koch v. Koch*, 874 S.W.2d 571, 578 (Tenn. Ct. App. 1993); Tenn. Comp. R. & Regs. r. 1240-2-4-.03(3)(a) (1994).

However, if the court has no reliable evidence of the obligor parent's income, it should impute an annual gross income of \$25,761¹ when establishing an initial order of support. *Campbell v. Campbell*, No. 02A01-9711-CH-00286, 1998 WL 765715, at *2 (Tenn. Ct. App. Nov. 4, 1998) (No Tenn. R. App. P. 11 application filed); *State ex rel. Rion v. Rion*, No. 01A01-9704-CV-00194, 1997 WL 796212, at *2 (Tenn. Ct. App. Dec. 31, 1997) (No Tenn. R. App. P. 11 application filed); *Hyden v. Hyden*, No. 02A01-9611-CH-00273, 1997 WL 593800, at *2-3 (Tenn. Ct. App. Sept. 25, 1997) (No Tenn. R. App. P. 11 application filed); Tenn. Comp. R. & Regs. r. 1240-2-4-.03(3)(e). Reliable evidence of income includes tax returns or check stubs. Tenn. Comp. R. & Regs. r. 1240-2-4-.03(3)(e) (1994).

The trial court had no alternative to the imputation of an annual gross income of \$25,761 in calculating Mr. Leopold's child support obligations. He failed to produce reliable evidence of his

¹This was the "average of the median annual income for Tennessee families" in 1990. Tenn. Comp. R. & Regs. r. 1240-2-4-.03(3)(e).

income such as income tax returns, or even to file a sworn income and expense statement with the trial court as required by local rules of court. His testimony concerning his income was not helpful. The presumptive monthly amount Mr. Leopold must pay to support his children is thirty-two percent of his net income, which the trial court calculated to be \$552. We affirm the trial court's determination of Mr. Leopold's child support obligation.

IV. Marital Property and Indebtedness

Mr. Leopold argues that the trial court inequitably divided the marital property and debt. Dividing a marital estate necessarily begins with classification of the property as either separate or marital property. *McClellan v. McClellan*, 873 S.W.2d 350, 351 (Tenn. Ct. App. 1993). Courts should distribute the parties' separate property, and then divide their marital property in an equitable manner. *Batson v. Batson*, 769 S.W.2d 849, 856 (Tenn. Ct. App. 1988). A division of marital property is not rendered inequitable simply because it is not precisely equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn. 1988), or because each party did not receive a share of every piece of marital property. *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994). The marital estate was not significant particularly when balanced against the incumbrances.

Dividing a marital estate is not a mechanical process but, rather, is guided by considering the factors in Tenn. Code Ann. § 36-4-121(c) (1996). Trial judges have wide latitude in fashioning an equitable division of marital property, *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983); *Brown v. Brown*, 913 S.W.2d at 168. We ordinarily defer to the trial judge's decision unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-121(c), or is not supported by a preponderance of the evidence. *Brown v. Brown*, 913 S.W.2d at 168; *Mahaffey v. Mahaffey*, 775 S.W.2d 618, 622 (Tenn. Ct. App. 1989); *Hardin v. Hardin*, 689 S.W.2d 152, 154 (Tenn. Ct. App. 1983).

The trial court correctly considered it inequitable to assign any business debt, or deficiency from the sale of the business to Ms. Leopold. Mr. Leopold did not produce documentary evidence of several business debts he claimed. The trial court doubted his credibility and believed that he may be hiding assets. We cannot find that the preponderance of the evidence requires a different resolution of the division of marital estate or allocation of debt.

V. Attorney's Fees

Finally, Mr. Leopold argues that the trial court's decision to award Ms. Leopold her attorney's fees as alimony in solido is improper. In a divorce action, an award of attorney's fees is treated as alimony. *Smith v. Smith*, 912 S.W.2d 155, 161 (Tenn. Ct. App. 1995); *Gilliam v. Gilliam*, 776 S.W.2d 81, 86 (Tenn. Ct. App. 1988). The decision to award attorney's fees lies within the sound discretion of the trial judge, *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995); *Brown v.*

Brown, 913 S.W.2d at 170, and this court will not interfere with the trial court's decision unless the evidence preponderates against it. *Batson v. Batson*, 769 S.W.2d at 862. A party is entitled to attorney's fees when he or she lacks sufficient funds to pay his or her legal expenses or would find it necessary to deplete other assets to do so. *Brown v. Brown*, 913 S.W.2d at 170; *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995).

The evidence does not preponderate against the trial court's decision to award Ms. Leopold her attorney's fees. At the time of trial, she had a gross monthly salary of \$1,516 or just over \$18,000 per annum. Mr. Leopold testified that he earned \$55,000 in 1998 but that his income had dropped precipitously since closing Bill's Automotive in January 1999. However, as previously mentioned, Mr. Leopold produced no corroborating evidence of his financial reversals, and the trial court doubted his credibility. We have concluded that the award of \$4,063 in attorney's fees to Ms. Leopold is appropriate, particularly in view of the fact that the trial court awarded her no other alimony.

VI. Frivolous Appeal

Ms. Leopold asserts that this appeal is frivolous and that we should award her damages pursuant to Tenn. Code Ann. § 27-1-122 (1980) for having to defend it. Appeals are frivolous if they are devoid of merit or have little prospect of success. *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978); *Industrial Dev. Bd. of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995). While being partially successful on appeal removes a case beyond the effect of Tenn. Code Ann. § 27-1-122, *Pittman v. Lasco Indus., Inc.*, 908 S.W.2d 932, 937 (Tenn. 1995), an unsuccessful appeal does not necessarily indicate that an appeal is frivolous. This appeal is not frivolous.

VII.

We affirm the judgment as modified and remand the case to the trial court for whatever further proceedings may be required. We also tax the costs of this appeal to William F. Leopold and his surety for which execution, if necessary, may issue.

PER CURIAM